

RETURN DATE: APRIL 16, 2019	:	MAJOR A MINOR: 00
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DUNCAN NEW HAVEN OWNER LLC	:	SUPERIOR COURT
	:	
V.	:	JUDICIAL DISTRICT OF NEW HAVEN
	:	AT NEW HAVEN
	:	
CITY OF NEW HAVEN BOARD OF	:	MARCH 8, 2019
ZONING APPEALS	:	

**CITATION**

**TO ANY PROPER OFFICER, GREETING:**

By authority of the State of Connecticut, you are hereby commanded to summon the City of New Haven Board of Zoning Appeals to appear before the Superior Court for the Judicial District of New Haven at New Haven on or before April 16, 2019 (the "return date") then and there to answer unto the appeal of Duncan New Haven Owner LLC, with an address of c/o AJ Capital Partners, 133 N. Jefferson Street, 4<sup>th</sup> Floor, Chicago, IL 60661 by serving two true and attested copies of this Citation, Recognizance and Appeal at least twelve days before the return date with the City Clerk of the City of New Haven, 200 Orange Street, New Haven, Connecticut, in accordance with CONN. GEN. STAT. §§ 52-57(b)(5) and 8-8.

The Plaintiff, as principal, and Johanna Rivera of 1825 State Street, Hamden, Connecticut, as surety, are hereby recognized in the sum of \$500.00 to prosecute the foregoing appeal to full effect, pay any costs for which judgment may be rendered against Plaintiff and comply with the orders and decrees of the Court.

HEREOF FAIL NOT, but due service and return make.

Dated at New Haven, Connecticut the 8<sup>th</sup> day of March, 2019.

THE PLAINTIFF,  
DUNCAN NEW HAVEN OWNER, LLC

BY: Carolyn W. Kone  
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- Its Attorney -

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APPEAL

TO THE SUPERIOR COURT for the Judicial District of New Haven at New Haven comes Duncan New Haven Owner LLC (“Plaintiff”) appealing from the action of the City of New Haven Board of Zoning Appeals (the “BZA”) pursuant to CONN. GEN. STAT. § 8-8 and complains and says:

The Parties

1. Plaintiff, Duncan New Haven Owner LLC, is a Delaware limited liability company, having an address of c/o AJ Capital Partners, 133 N. Jefferson Street, 4<sup>th</sup> Floor, and Chicago, Illinois 60661. Plaintiff is the owner of real property known as 1151 Chapel Street, New Haven, CT 06511 (the “Property”), upon which a hotel that was formerly known as the Hotel Duncan is located (the “Hotel”). The Property is located in the BD-1 Central Business/Residential District (the “BD-1 District”), as such district is defined in the City of New Haven Zoning Ordinance (the “Zoning Ordinance”).

2. The Hotel was constructed in 1894 and was initially used as a residence for Yale University students and thereafter was in continuous operation as a hotel until it was acquired by Plaintiff in July 2017 and closed for renovation in approximately December 2017. The Hotel had restaurants in its lower level at which alcohol was served since at least 1942 until it closed in the summer of 2017. Most recently, the last restaurant to occupy the lower level space in the Hotel

held a Restaurant Liquor Permit issued by the Connecticut Department of Consumer Protection, Liquor Control Division (the “Liquor Commission”).

3. The Hotel is anticipated to reopen in the fall of 2019 with 72 guest rooms. When the Hotel reopens, it will be known as Graduate New Haven and will offer food and beverage services.

4. The BZA was created by Special Act 478 of the 1921 Connecticut General Assembly and Special Act 490 of the 1925 Connecticut General Assembly. Pursuant to Section 63(d) of the Zoning Ordinance, the BZA is the authority responsible for granting special exceptions.

#### The Special Exception Applications

5. On November 16, 2018, Plaintiff applied to the BZA for two special exceptions. One special exception was to permit Plaintiff to serve alcohol pursuant to a Hotel Liquor Permit to be applied for from the Liquor Commission. Pursuant to Zoning Ordinance, § 42, Table 3, Subsection E, if liquor is served in an establishment in the BD-1 District other than pursuant to a Restaurant Liquor Permit issued by the Liquor Commission, a special exception must be obtained. The standards for granting a special exception are set forth in § 63 of the Zoning Ordinance.

6. On November 16, 2018, Plaintiff also applied to the BZA for a special exception for a reduction in required parking. Under the Zoning Ordinance, if alcohol is served in an establishment in the BD-1 District other than pursuant to a Restaurant Liquor Permit, one parking space is required for every four seats where alcohol is to be served. (§ 45(a)(7) of the Zoning Ordinance). Due to the number of seats in the Hotel where alcohol could be potentially consumed, 59 spaces are required under the Zoning Ordinance. In its special exception

application for a reduction in the number of required parking spaces, Plaintiff requested that it be permitted to provide only one parking space on the Property, because virtually all of the Property is covered by the Hotel (as has been the case since the Hotel was constructed in 1894), and there is no room for any other parking spaces on the Property. The Hotel has operated on the Property for decades without any parking and without any disruption to the community due to the lack of parking.

7. Under § 45(a)(7) of the Zoning Ordinance, the BZA has the power to grant a special exception to reduce parking requirements upon a finding that particular circumstances exist or mitigative measures will be provided. Particular circumstances may include, but are not limited to, availability of public parking, proximity to public transit or significant levels of pedestrian access. In addition, a special exception request to reduce required parking is to be evaluated with respect to all of the standards for a special exception set forth in § 63(d) of the Zoning Ordinance. (Plaintiffs' Special Exception Applications may be collectively be referred to as "Plaintiff's Applications").

#### The City Plan Department Advisory Report

8. Pursuant to § 63(e)(2) of the Zoning Ordinance, the BZA was required to forward Plaintiff's Applications to the City of New Haven City Plan Department (the "City Plan Department") for an advisory report, which it did. The City Plan Department Advisory Report (the "Department Advisory Report") was provided to the members of the BZA prior to the public hearing on Plaintiff's Applications.

9. In a four page single spaced report, the City Plan Department examined each of the standards for special exceptions under §§ 45(a)(7) and 63(d) of the Zoning Ordinance and found that Plaintiff's Applications satisfied each of the criteria.

10. The Department Advisory Report noted that the Hotel was located in the heart of downtown New Haven and that there were a number of other restaurants in the area with liquor permits, none of which having off street, on-site parking as well as another hotel next door. The Department Advisory Report found that liquor service on the Property was compatible with the character of the area, which is an arts, culture and densely developed entertainment district that includes art galleries, theaters, Yale University, and restaurants. The Department Advisory Report stated that the Hotel would enhance the present and future development of the surrounding area by providing another entertainment option for visitors and residents and cited the goal of the City of New Haven's Comprehensive Plan of Development to reinforce the City's position as a world class destination for arts and entertainment. The Report further noted that the area in which the Property is located is not a densely developed residential part of New Haven.

11. With respect to the parking and traffic impacts of the relief requested in Plaintiff's Applications, the Department Advisory Report noted that the Hotel Duncan and its prior restaurants had functioned for decades without any off-street parking and without harming the development of the area. The Department Advisory Report also mentioned that the surrounding area is a retail and restaurant destination, where the establishments have minimal off-street parking. The Department Advisory Report found that there should be "little additional impact upon traffic and parking" from the proposed liquor service at the Hotel, noting that no parking is required for either a hotel or a restaurant in the BD-1 District. The Department Advisory Report determined that the resulting traffic patterns should not be disturbed by reducing the required parking because of a number of factors, including the Hotel's plans to provide valet parking, the location of the Property on a Connecticut Transit Bus Line and close to Yale shuttle bus lines and the fact that the Hotel is easily accessible by bike (Plaintiff's Applications proposed 9 new

bike spaces on the Property) and by walking because of its central location, which the Department Advisory Report stated should minimize the need for off-street parking. The Department Advisory Report also noted that the Hotel is close to the Chapel York Garage, a public parking garage. The Department Advisory Report concluded that the Special Exceptions requested “should not generate any more impact, whether traffic or parking related, than any freestanding restaurant adjacent to a hotel.”

12. The Department Advisory Report recommended that Plaintiff’s Applications be approved with the condition that a “[w]ritten agreement between the Hotel and the appropriate authority concerning the location and operation of valet parking to be submitted prior to City signoff on Hotel Liquor License Permit” (the “Valet Agreement”). In order for the City to sign off on the Hotel Liquor Permit, Plaintiff’s Applications would have needed to have been approved by the BZA. Therefore, the Department Advisory Report was recommending that the Valet Agreement be submitted to the City after the BZA proceedings on Plaintiff’s Applications had concluded.

#### The Public Hearing

13. A public hearing was held on Plaintiff’s Applications on January 8, 2019 (the “Public Hearing”). At the Public Hearing, approximately 10 members of the public testified in favor of granting Plaintiff’s Applications, and a letter in support of Plaintiff’s Applications from a member of the public was read into the record. No person testified against granting Plaintiff’s Applications.

14. The Alder from Ward 1 in which the Property is located, Hacıby Catalbasoglu, testified that he supported Plaintiff’s Application which he believed to be consistent with a New

Urbanist perspective that the downtown should be pedestrian friendly with a dense diversity of businesses.

15. On behalf of two neighborhood organizations, the Dwight Central Management Team and the Greater Dwight Development Corporation, which is a nonprofit created by neighborhood residents and their partners to invest in the social and economic life of the Dwight community where the Property is located, Linda Townsend Maier, the Executive Director of the Greater Dwight Development Corporation, told the BZA that the Hotel would bring more pedestrian traffic to the neighborhood, making the area safer.

16. Brian McGrath, the former head of the City's Department of Traffic and Parking and currently staff to the Chapel Street Special Services District in which the Property is located, testified that the area has plenty of parking, the reduction in parking should not pose any problems for the neighborhood and even when the Hotel Duncan was full in the past, there were no parking problems.

17. Richard Longo, who served as the manager for the Hotel Duncan for many years, told the BZA that the lack of on-site parking was not a problem for the area when the Hotel Duncan and the restaurant in the lower level operated in the past.

18. Others testifying in favor of Plaintiff's Applications included local business owners, such as Soraya Kaoroptham, an owner of a sushi restaurant across Chapel Street from the Hotel, who noted the very close proximity of a public parking garage to the Property.

19. During the hearing, the Chair of the BZA asked Plaintiff's counsel whether the Plaintiff would agree to the condition suggested in the Department Advisory Report which required that the Hotel provide the City with the Valet Agreement prior to the City of New Haven's (the "City") sign-off on the Hotel Liquor Permit application for Plaintiff. Plaintiff's



counsel agreed to this condition of approval. At the Public Hearing, no member of the BZA requested that Plaintiff or the City provide the Valet Agreement to the BZA.

20. The Public Hearing on Plaintiff's Applications was closed on January 8, 2019.

#### The City Plan Commission

21. Pursuant to § 63(d)(6)f of the Zoning Ordinance, Plaintiff's Application to reduce the parking requirement for its Hotel Liquor Permit was referred to the New Haven City Plan Commission (the "City Plan Commission") for an advisory report. Under § 63(d)(6) of the Zoning Ordinance, the BZA is required to take into account the report of the City Plan Commission when making a decision on an application for a special exception to reduce a parking requirement. The Zoning Ordinance does not require that Plaintiff's Application for a special exception for its Hotel Liquor Permit be referred to the City Plan Commission.

22. At its January 23, 2019 meeting, the City Plan Commission considered Plaintiff's Application for a Special Exception for a reduction in the required parking. When discussing Plaintiff's Application, the Chair remarked that he was familiar with the area where the Hotel is located and that there was plenty of on-street parking in that neighborhood.

23. The CPC Advisory Report regarding Plaintiff's Application (the "CPC Advisory Report") reviewed each of the standards for a special exception for a reduction in required parking set forth in § 63(d) of the Zoning Ordinance and recommended approval of Plaintiff's Applications. The CPC Advisory Report stated that the City's Department of Transportation, Traffic and Parking had also reviewed Plaintiff's Application and had raised no concerns, noting that the City's Traffic Authority had recently approved three drop-off spaces to facilitate the Hotel's operations similar to that provided for other hotels in the area.

## The Deliberations

24. On February 19, 2019, the BZA deliberated on Plaintiff's Applications. The Chair of the BZA began the deliberations by noting that there were a number of speakers at the Public Hearing who had spoken in favor of Plaintiff's Applications and that the CPC Advisory Report recommended approval of the Plaintiff's Applications. The BZA Chair then made a motion to approve Plaintiff's Applications.

25. Sarah Locke, another member of the BZA, thereafter stated that Plaintiff's Applications were not complete or transparent because neither the City nor the Plaintiff had provided the BZA with a copy of the Valet Agreement.

26. Plaintiff had never been asked to provide a copy of the Valet Agreement to the BZA or the City, and Plaintiff had been led to believe that a copy of the Valet Agreement would not be required until the BZA proceedings had concluded and Plaintiff was requesting that the City sign-off on its application for a Hotel Liquor Permit. Plaintiff could not respond to Ms. Locke's statement described above because it was made during deliberations.

27. Ms. Locke also stated during deliberations that even had the Valet Agreement been provided to the BZA, it would have set forth only a temporary solution for the relief being requested, because such an agreement would eventually expire. Plaintiff again could not respond to this statement, because Ms. Locke made this statement during deliberations, long after the Public Hearing had been closed.

28. Ms. Locke also told the other members of the BZA during the deliberations that she had requested a copy of the Valet Agreement, and that the Valet Agreement had not been provided to her. However, no such request had ever been made to Plaintiff at any time. Again,

because Ms. Locke's statement was made during deliberations, Plaintiff was not permitted to rebut it.

29. During deliberations on Plaintiff's Applications, Shirl Wilkins, another member of the five member Board of Zoning Appeals stated that she agreed with Ms. Locke's statements and was also concerned that Plaintiff had not produced a resident of the area in which the Property is located to support Plaintiff's Applications, despite the fact that the Alder for the Ward in which the Property is located, as well as a Management Team representative expressly spoke in favor of the Plaintiff's Application at the Public Hearing.

30. During deliberations on Plaintiff's Applications, Michael Piscitelli, the Acting Executive Director of the City Plan Department, suggested to the BZA that it could add a condition to the approval of Plaintiff's Applications which would require Plaintiff to submit a signed copy of the Valet Agreement to be placed on the land records or that the BZA could table Plaintiff's Applications until its next meeting, and during the intervening period, the BZA could review a copy of the Valet Agreement before its members voted on Plaintiff's Applications. The BZA did not even discuss or vote on either of these proposals.

31. BZA Board Member Alphonse Paolillo, Sr. stated that based on Ms. Locke's statement that she had asked for a copy of the Valet Agreement and that "neither the City nor the developers" had provided a copy of the Agreement, he was making a motion to deny Plaintiff's Applications. Mr. Paolillo's motion was seconded by Ms. Locke. Four members of the BZA, including Ms. Locke and Ms. Wilkins, voted to deny Plaintiff's Applications, while the Chair of the BZA abstained from voting on the motion.

32. There was no resolution passed by the BZA or statement of the collective reasons of the BZA for denying the Plaintiff's Applications or consideration of any of the evidence produced at the Public Hearing which supported the approval of Plaintiff's Applications.

33. On February 21, 2019, the Secretary of the BZA sent Plaintiff's attorney a letter stating that Plaintiff's Applications had been denied "based upon the lack of off-street parking and related parking/traffic issues insinuated with the proposal" (the "Denial Letter"), although there had been no discussion, by the BZA or evidence presented to the BZA, of a lack of sufficient off street parking in the neighborhood or any traffic issues. The Denial Letter also misstated that Plaintiff's Special Exception Applications were considered by the BZA on November 13, 2018.

34. On February 23, 2019, the BZA's decision denying Plaintiff's Applications was published in the New Haven Register. Plaintiff's Applications were the only applications denied by the BZA on February 19, 2019, which approved 11 other special exception and/or variance applications on that date.

#### Aggrievement

35. Plaintiff is aggrieved by the denial of Plaintiff's Applications because it is in the owner of the Property that is the subject of Plaintiff's Applications.

#### Legal Claims

36. The BZA's denial of Plaintiff's Applications was unreasonable, arbitrary, capricious, illegal, an abuse of discretion, in violation of the Zoning Ordinance and not supported by substantial evidence, because:

(a) There is no substantial evidence to support a denial of Plaintiff's Applications. The BZA unlawfully ignored the uncontradicted evidence that Plaintiff's Applications complied

with all of the standards for granting special exceptions, including those for reducing parking requirements, as set forth in §§ 63(d) and 45(a)(7) of the Zoning Ordinance. The BZA ignored and did not even discuss the Department Advisory Report and the CPC Advisory Report, which both concluded that Plaintiff's Applications met all of the standards for granting special exceptions and did not even discuss the evidence regarding Plaintiff's Application for a Hotel Liquor Permit or the standards for granting such special exception. The BZA further unlawfully ignored the uncontradicted evidence that (i) the Hotel and its restaurant have been in existence for decades (in the case of the Hotel, for more than a century) without providing on-site, off-street parking and without causing any traffic or parking issues or alcohol related problems; (ii) there are no parking requirements for either the Hotel and its restaurant in the BD-1 District under the Zoning Ordinance, and, in the absence of an application for a Hotel Liquor Permit, there would be no parking requirements for either establishment; (iii) the Hotel and its restaurant are located in a downtown area, proximate to a 487 space public parking garage and where on-street parking is plentiful; (iv) there are a number of restaurants proximate to the Hotel, which do not provide on-site parking without causing difficulties with parking or traffic, (v) because of its location in downtown New Haven, the Hotel and its restaurant are easily accessible both for pedestrians and bicyclists (9 bike racks at the Hotel will be provided for the first time) and are proximate to eight Connecticut Transit bus lines and two Yale Shuttle bus lines which have bus stops located within one block of the Property; (vi) as only one of the means of mitigating the impact of not providing the required on-site parking, the Hotel will provide a valet service for Hotel and restaurant guests, for which the City's Traffic Authority has already provided three valet parking spaces in front of the Hotel, and (vii) two traffic and parking experts (the City's Office of Transportation, Traffic and Parking and the former Executive Director of that Office)

opined that granting Plaintiff's Applications will not cause traffic or parking problems in the neighborhood, which expert opinions are uncontradicted.

(b) Although it is impossible to determine the basis of the BZA's denial of the Plaintiff's Applications due to the lack of a resolution or any motion stating the collective reasoning of the members of the BZA, to the extent that the denial of the Plaintiff's Applications was based upon a finding of an "incomplete application" due to the BZA not having been provided with a copy of the Valet Agreement, this finding is unsupported by substantial evidence and is based upon errors of law for the following reasons: (i) there is no provision of the Zoning Ordinance or on the Special Exception application form that requires that an applicant for a reduction of a parking requirement who offers valet parking as a mitigative measure provide a copy of the agreement with the facility where the valeted cars are to be stored; (ii) the Department Advisory Report stated that a copy of the Valet Agreement would not be due until the Plaintiff asked the City to sign-off on its application for a Hotel Liquor Permit, which would not occur until after the BZA voted on Plaintiff's Applications; (iii) neither the City Plan Department nor the City Plan Commission considered the Plaintiff's Applications to be incomplete in their advisory reports to the BZA; (iv) at the Public Hearing, although there were questions asked by BZA members about the Valet Agreement, including specific questions about Plaintiff's willingness to provide a copy of the Valet Agreement at the time of the City's signoff on the Hotel Liquor Permit application as a condition of approval, there was no request from any member of the BZA to Plaintiff that a copy of the Valet Agreement be provided to the BZA or any of its members at any time prior to City sign-off on the Plaintiff's application for a Hotel Liquor Permit; and (iv) Plaintiff was never advised that Plaintiff's Applications were incomplete.

(c) The process by which the BZA considered Plaintiff's Applications violated Plaintiff's rights to due process of law under the United States and Connecticut Constitutions and to fundamental fairness as follows: (i) to the extent that the denial of the Plaintiff's Applications was based upon the BZA not having been provided with a copy of the Valet Agreement, Plaintiff had no notice that the provision of the Valet Agreement was required by the BZA; (ii) Ms. Locke and Ms. Wilkins raised for the first time during deliberations that Plaintiff had not provided a copy of the Valet Agreement and their concern about where the valeted cars would be parked once the Valet Agreement has expired without providing Plaintiff with any opportunity to rebut or address these concerns; (iii) during deliberations, Ms. Locke introduced "new evidence" that she had requested a copy of the Valet Agreement which had not been provided to her, which statement Mr. Paolillo interpreted as meaning that neither the City "nor the developers" had provided a copy of the Valet Agreement when requested to do so. Plaintiff was not permitted to rebut Ms. Locke's and Mr. Paolillo's statements, which resulted in Mr. Paolillo making a motion to deny Plaintiff's Applications; and (iv) the BZA ignored and did not even discuss the substantial evidence presented at the Public Hearing and the conclusions of the Department Advisory Report and the CPC Advisory Report that ample parking would be provided without any detrimental effect on the surrounding neighborhood and that Plaintiff's Applications met all of the standards for a special exception in the Zoning Ordinance, focusing instead only on not having been provided with a copy of the Valet Agreement, which Ms. Locke and Ms. Wilkins admitted would not have satisfied their concerns about parking, even had it been provided; and (iv) the reasons stated in the Denial Letter from the BZA – "the lack of off-street parking and the related parking/traffic issues insinuated with the proposal" were not even discussed by the BZA

during its deliberations, are so vague as to fail to provide notice to the Plaintiff as to the reasons for the denial of Plaintiff's Applications and are without any evidentiary support.

(d) To the extent that the denial of Plaintiff's Applications was based upon Plaintiff's claimed failure to produce any residents of the area where the Hotel is located to support Plaintiff's Applications, such denial (i) is based upon errors of law because a decision on a special exception application may not be based upon neighborhood opinion and because there is no provision in the Zoning Ordinance which requires an applicant for a special exception to produce testimony from a resident of a neighborhood who supports the special exception application and (ii) is based upon statements made by Ms. Wilkins during the BZA deliberations that are clearly contrary to the substantial uncontradicted evidence that the residents in this primarily business district did support the Plaintiff's Applications, which the BZA chose to ignore.

(e) The Denial Letter from the BZA is unlawful because (i) the reasons set forth in the Denial Letter for denying Plaintiff's Applications were not even discussed by the BZA during the deliberations on Plaintiff's Applications; (ii) the statement in the Denial Letter that Plaintiff's Applications were denied because of "lack of off-street parking" is based upon an error of law as the provision of off-street parking is not one of the standards for granting special exceptions for a Hotel Liquor Permit or for a reduction in parking; (iii) the statement in the Denial Letter that Plaintiff's Applications were denied because of "lack of off-street parking" is not supported by substantial evidence because there was substantial evidence that ample off-street parking would be provided for Plaintiff's liquor service in a nearby 487 space public parking garage and by means of Plaintiff's provision of valet parking for Hotel and restaurant guests; and (iv) the statement in the Denial Letter that Plaintiff's Applications were denied based




upon “related parking/traffic issues insinuated with the proposal” is vague and unintelligible and is not supported by substantial evidence because the uncontradicted evidence at the Public Hearing, including reports by the City Plan Department and the City Plan Commission and evidence from traffic and parking experts and others, which the BZA ignored, established that granting Plaintiff’s Applications would not cause any traffic or parking problems in the neighborhood.

WHEREFORE, the Plaintiff requests:

1. That this appeal be sustained;
2. That the decision of the BZA denying Plaintiff's Applications be overturned;
3. That Plaintiff's Applications be granted; and
4. Such other and further relief as this Court may deem just and proper.

Dated at New Haven this 8<sup>th</sup> day of March 2019.

DUNCAN NEW HAVEN OWNER LLC

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